SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
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October Term, 1976

No._____

76-580

JOHN B. BRECKINRIDGE, TIM LEE CARTER, CARL D. PERKINS, ROMANO L. MAZZOLI, WALTER D. HUDDLESTON, WENDELL H. FORD, ROBERT F. STEPHENS, ROBERT TURLEY, CITY OF RICHMOND, a municipal corporation, LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, a public body corporate, GREATER LEXINGTON CHAMBER OF COMMERCE, WILLIAM C. JACOBS, SHIRLEY PATRICK, DALLAS OSBORNE, GEORGE L. GILES, PAUL L. DUNN, HAROLD V. MADDEN, and ALEX G. PERRY, ... PETITIONERS.

VS:

DONALD H. RUMSFIELD, Secretary of Defense of the United States, MARTIN R. HOFFMANN, Secretary of the Army of the United States, GENERAL FRED C. WEYLAND, Chief of Staff of the United States Army, THE UNITED STATES DEPARTMENT OF DEFENSE, and THE UNITED STATES ARMY, ... RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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No._____

JOHN B. BRECKINRIDGE, TIM LEE CARTER, CARL D. PERKINS, ROMANO L. MAZZOLI, WALTER D. HUDDLESTON, WENDELL H. FORD, ROBERT F. STEPHENS, ROBERT TURLEY, CITY OF RICHMOND, a municipal corporation, LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, a public body corporate, GREATER LEXINGTON CHAMBER OF COMMERCE, WILLIAM C. JACOBS, SHIRLEY PATRICK, DALLAS OSBORNE, GEORGE L. GILES, PAUL L. DUNN, HAROLD V. MADDEN, and ALEX G. PERRY, ... PETITIONERS,

VS:

DONALD H. RUMSFIELD, Secretary of Defense of the United States, MARTIN R. HOFFMANN, Secretary of the Army of the United States, GENERAL FRED C. WEYLAND, Chief of Staff of the United States Army, THE UNITED STATES DEPARTMENT OF DEFENSE, and THE UNITED STATES ARMY, ... RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-styled case on July 9, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 537 F.2d 864 and is set out in the Appendix hereto at pages 1a-8a. The opinion and order of the United States District Court for the Eastern District of Kentucky is unreported but is set out in the Appendix hereto at pages 9a-30a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 9, 1976, and is appended hereto at pages 34a-35a of the Appendix. A Petition for Rehearing was timely filed by Petitioners but was denied by order dated August 13, 1976. The Judgment on Mandate, a copy of which appears at pages 36a-38a of the Appendix, was issued on September 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §4321, *et seq.*, are applicable with respect to a proposed federal action to eliminate jobs and substantially close the Lexington-Bluegrass Army Depot with a related change in use of the surrounding land from agricultural to airport-industrial and to transfer

functions and personnel to other military installations, where such proposed action admittedly constitutes "a major federal action" within the meaning of the National Environmental Policy Act of 1969 and where the trial court has found that an environmental assessment has not been prepared in conformance with that Act?

STATUTES AND REGULATIONS INVOLVED

1. Section 101 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4331, provides:

> Congressional declaration of national environmental policy
>
> (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote

the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

2. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. §4332, provides:

Cooperation of agencies; reports, availability of information; recommendations; international and national coordination of efforts

The congress authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure

that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce

environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

3. 40 C.F.R. § 1500.8(a)(3)(iii) provides:

Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e.g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities or through changes in natural conditions may often be even more substantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects.

4. Army Regulation 2-11(c) and (d) provides:

c. Not be limited to ultimate conclusions, but contain a thorough evaluation of all factors affecting the potential environmental impact of the proposal that will reasonably justify conclusions presented.

d. Be a complete and objective appraisal of the beneficial and adverse environmental effects of available alternatives, rather than a justification for the proposal. In no case should adverse effects, either real or potential, be ignored or slighted in an attempt to justify an action previously recommended. Similarly, care must be taken to avoid overstating favorable effects.

STATEMENT OF THE CASE

This action was instituted by Petitioners to require Respondents to comply with the National Environment Policy Act of 1969 (hereinafter referred to as "NEPA") and prepare an environmental impact assessment and statement prior to transferring functions and personnel from the Lexington-Bluegrass Army Depot (hereinafter refferred to as "LBAD") to Tobyhanna, Pennsylvania, and Sacramento, California, thereby reducing the work force at LBAD by approximately 2650 civilian and military jobs and changing some 15,000 acres of presently unused LBAD "Bluegrass" from habitant-agricultural to airport-industrial. Petitioners further sought to require Respondents to comply with the public participation aspects of NEPA prior to reaching a decision regarding the action proposed.

On November 22, 1974, after months of proclaiming that he had no such idea in mind, the Secretary of Defense announced, as part of Project Concise, the transfer of the communications repair mission from LBAD located at Lexington, Kentucky, to installations located at Sacramento, California, and Tobyhanna, Pennsylvania, and a resulting reduction of 2630 civilian jobs at LBAD. Prior to such announcement, the Department of the Army, the federal agency having jurisdiction over LBAD, had kept a "close-hold" tab on the project,

and, therefore, there had been no consultation with local authorities and public officials.

On August 22, 1975, Petitioners filed their complaint seeking to enjoin Respondents from transferring the functions now performed at LBAD to installations in Pennsylvania and California on the ground that the Department of the Army had failed to comply with NEPA, the Environmental Quality Act of 1970, 42 U.S.C. § 4371, *et seq.*, and the Army's own regulations. Jurisdiction in the district court was based upon 28 U.S.C. § 1331(a) and 5 U.S.C. § 702, and jurisdiction to grant declaratory relief rested upon 28 U.S.C. §§2201 and 2202.

Petitioners subsequently filed a motion for a preliminary injunction, and Respondents, prior to filing an answer, moved for summary judgment. The district court, on the evidence presented at the hearing on the motion for a preliminary injunction, granted Petitioners injunctive relief directing Respondents to comply fully with the requirements of NEPA including the preparation of an environmental impact statement with due regard to the procedural requirements of said Act for public input prior to implementation of the proposed plan to close down the LBAD facility. A preliminary injunction was issued enjoining the Army from carrying out any phase of the proposed realignment

of duties and functions of LBAD pending the filing of the environmental impact statement.

This case centers around section 102 of NEPA, 42 U.S.C. § 4332, and particularly subsection (2)(c) thereof which provides that all agencies of the federal government shall:

> "(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
> (i) the environmental impact of the proposed action,
>
> * * *
>
> Subsection (v) of this section provides:
>
> . . . copies of such statement and the comments and views of the appropriate Federal, State and local agencies which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by Section 552 of Title 5 and shall accompany the proposal through the existing agency review process;. . ."

It was admitted that the proposal concerning LBAD was a major Federal action within the meaning of 42 U.S.C. § 4332, and it was further admitted that an environmental impact statement was not prepared.

In order to determine whether or not an environmental impact statement is necessitated by 42 U.S.C. § 4332, the particular federal agency involved must make its own threshold determination as to such necessity by conducting a meaningful inquiry into the impact of its proposed action and by preparing an environmental impact assessment with regard to the proposed action. With respect to the required environmental impact assessment, Army Regulation 2-11(c) to (d) provides:

> "c. Not be limited to ultimate conclusions but contain a thorough evaluation of all factors affecting the potential environmental impact of the proposal that will reasonably justify conclusions presented.
>
> d. Be a complete and objective appraisal of the beneficial and adverse environmental effects of available alternatives, rather than a justification for the proposal. In no case should adverse effects, either real or potential, be ignored or slighted in an attempt to justify an action previously recommended. Similarly, care must be taken to avoid overstating favorable effects."

The only document in the record before the district court that could be called an "environmental assessment" was filed by Respondents as a part of the Project Concise Report. This "assessment," which is undated and unsigned, consisted merely of

one and one-third pages of perfunctory conclusions unsupported by any factual data. This document clearly did not constitute an environmental impact assessment within the meaning of NEPA and did not meet the requirements of Army Regulation 2-11.

LBAD includes major and significant plant facilities and a substantial 15,376 acres of land. Respondents propose to substantially curtail the functions of LBAD and to use the excess land created thereby for an airport and industrial park, thereby changing its present agricultural use. Nevertheless, the "assessment" does not even mention the abandonment of the present use of this land for use as an airport-industrial complex. Moreover, the record made in the district court demonstrates that Respondents failed to consult with local authorities and public officials prior to the announcement of the action regarding LBAD. Indeed, prior to the public announcement of Project Concise, the Department of Defense had strongly and periodically advised Congressman John Breckinridge and Congressman Carl Perkins, among others, that they had no plans for any change in the function of LBAD. As part of the justification for Project Concise, the Army pointed to the Battelle Research Report, prepared by a non-governmental research company, but it was proven that it had been paid for and rewritten by the Army after it had already decided to reduce the number of employees at LBAD.

The district court found that Respondents "maintained what they term a 'close-hold tab' on the proposed action during the course of their decision-making process and subsequent review" and that the record "reflects that the studies encompassing environmental aspects of the proposed action were only initiated after the initial decision was made." The trial court further found that changes were made in the Battelle Report by Battelle to strengthen it at the behest of the Department of Defense and Department of the Army. The district court concluded that it "would appear that the initial decision was made prior to the collection of information concerning the impact of the proposed action and that the reports submitted were not objective studies, as purported, but were made with an eye towards the justification of the initial decision."

Regarding Respondents' failure to follow the procedures contemplated by NEPA, the district court emphasized that NEPA "is a procedural act implemented to insure that appropriate safeguards are taken at all stages of the agency decision-making process" and that compliance with the Act "requires at the minimum a good faith effort on the part of the responsible federal agency to objectively weigh the real or potential environmental ramifications of a proposed action, as opposed to a subjective impartiality." The lower court concluded that to

"say that these *ex post facto* efforts of the defendants, shrouded in secrecy, comply with the strict procedural requirements of NEPA would be to blithely ignore the mandate of the Act, which requires consideration of environmental matters to be more than a mere pro forma ritual conducted after the intitial decision has been made."

Respondents appealed to the United States Court of Appeals for the Sixth Circuit from the order of the district court granting Petitioners a preliminary injunction. At the time of the appeal, Petitioners had not been given an opportunity to fully present their case but had presented only enough evidence to justify the issuance of a preliminary injunction. Indeed, when the mandate issued, a motion was pending before the district court for a hearing date to present full evidence in support of a motion for a permanent injunction.

On July 9, 1976, the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court, dissolved the injunction, and ordered the case dismissed on the grounds that "there is no long term impact, no permanent commitment of a national resource and no degradation of a traditional environmental asset, but rather short term personal inconveniences and short term economic disruptions" and that NEPA, therefore, was not applicable. The opinion of the

Court of Appeals does not consider the findings and conclusions of the district court which formed the basis of that court's decision.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW ERRONEOUSLY DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW AND IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE PROPER INTERPRETATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 AND THE APPROPRIATE STANDARD OF REVIEW THEREUNDER.

The opinion rendered by the United States Court of Appeals for the Sixth Circuit recognizes that the scope of NEPA extends beyond the physical environment and that factors other than the physical environment must be considered by the appropriate federal agency provided the proposed action has a primary impact on the physical environment. The holding of the Court of Appeals that the present case does not fall within the purview of NEPA thus rests upon the court's conclusion that the proposed action will result only in short term personal inconveniences and short term economic disruptions. Assuming, however, that the Court of Appeals correctly held that socio-economic factors are alone not legally sufficient to require preparation of an environmental impact statement, the Court of Appeals nevertheless erred in the

present case (i) in failing to construe NEPA to require that an environmental assessment be prepared in accordance with procedures mandated by the Act and (ii) in concluding that the effect of the proposed federal action was limited to short term personal inconveniences and short term economic disruptions.

Assuming that NEPA could not be held applicable so as to require preparation of an environmental impact statement where it is ultimately determined that a proposed federal action can have only a socio-economic impact, NEPA clearly would be applicable at least to the extent of requiring a proper assessment of the potential effects upon the environment of a major federal action, and the action regarding LBAD admittedly is a major federal action. Only after a meaningful inquiry has been made can it be determined whether a major federal action will have only a socio-economic impact or will have or may have an affect upon "the quality of the human environment" and whether any such affect will be significant thus requiring preparation of an environmental impact statement. Certainly, the procedure followed in making an environmental assessment must be such as to permit a reliable analysis of the actual or potential affect of the major federal action upon "the quality of the human environment" as that phrase is used in NEPA.

Here, the Court of Appeals in effect held that preparation of an environmental assessment was not required because NEPA did not apply to the factual situation presented by this case. The opinion of the Court of Appeals states that the Army prepared an environmental assessment which concluded that an environmental impact statement was not required. However, the opinion of the Court of Appeals does not consider whether that assessment was performed in accordance with proper procedures and whether that assessment was such as would support the conclusion that the major federal action at issue could have only a socio-economic impact. No mention is made in the opinion of the findings of the district court which furnished the basis for that court's conclusion that the assessment was not legally sufficient and did not follow procedures called for by NEPA.

In any event, however, the record demonstrates that Petitioners' case was not limited to socio-economic problems, and the Court of Appeals erred in reaching a contrary conclusion. For example, no consideration was given to the fact that Respondents propose to substantially curtail functions at LBAD and to convert in excess of 15,000 acres of land to other uses including the creation of an airport and industrial park. Petitioners can prove, if given the opportunity, that the construction of an airport has a long term impact

and is a permanent commitment of a traditional environmental asset. Moreover, evidence presented to the district court establishes that the implementation of Project Concise would (1) reduce the work force at LBAD, thereby (2) reducing the payroll available in the community, thereby (3) reducing the amount of taxes to be collected by governments in the affected area from the reduced payrolls, thereby (4) reducing the amount of monies available to government for the control, management, improvement, care and protection of the physical and human environment of the people in the Central Kentucky area.

Petitioners, therefore, have not sought to extend the Congressional intent of NEPA or to obtain a decision solely on the basis of socio-economic impacts or short term personal inconveniences or economic disruptions. Under these circumstances, the Court of Appeals incorrectly construed NEPA so as to be entirely without application to the present case.

We submit that the construction of NEPA adopted by the Court of Appeals in this case is not consistent with decisions of other Circuit Courts of Appeals interpreting NEPA. As previously noted, before it can be determined whether an environmental impact statement is required, an environmental assessment must be prepared in order that a threshold determination may be made by the

federal agency as to the potential environmental impact of the proposed action. In making this threshold decision, the agency must conduct a sufficient investigation to be able to determine the types and potential magnitude of environmental impacts that can be expected from the proposed action; otherwise, an agency might frustrate the purposes of NEPA by a threshold decision based upon insufficient information. *Hanly* v. *Kleindienst,* 471 F.2d 823 (2nd Cir. 1972), *cert. denied,* 412 U.S. 908 (1973). A determination that a proposed action would not significantly affect the quality of the human environment based upon clearly insufficient information is unreasonable, arbitrary, capricious, and constitutes an abuse of discretion. *Hanly* v. *Mitchell,* 460 F.2d 640 (2nd Cir. 1972), *cert. denied,* 409 U.S. 990 (1972).

As stated in *McDowell* v. *Schlesinger,* 404 F.Supp. 221 (W.D. Mo. 1975), the agency must identify all areas of potential environmental concern flowing from the proposed action and must take a "hard look" at all potential impacts so identified including secondary impacts. Sufficient data must be gathered to allow the agency to consider realistically and in an informed manner the full range of potential effects of the proposed action. A negative determination as to the applicability of NEPA may not be based upon superficial reasoning or perfunctory analysis. For an agency's threshold

decision that NEPA does not apply to a proposed action to be valid, it must affirmatively appear from the administrative record, and from the written assessment, that the agency has given thoughtful and reasoned consideration to all of the potential effects of the proposed action, and that a convincing case has been made that the environmental impact will be insignificant. *See, generally, Hanly* v. *Mitchell,* 460 F.2d 640 (2nd Cir. 1972), *cert. denied,* 409 U.S. 990 (1972); *Hanly* v. *Kleindienst,* 471 F.2d 823 (2nd Cir. 1972), *cert. denied,* 412 U.S. 908 (1973); *Arizona Public Serv. Co.* v. *Federal Power Commission,* 483 F.2d 1275 (D.C. Cir. 1973); *Maryland-National Cap. Pk. & Pl. Commission* v. *U.S. Postal Service,* 487 F.2d 1029 (D.C. Cir. 1973); *First National Bank of Chicago* v. *Richardson,* 484 F.2d 1369 (7th Cir. 1973).

As was stated in *Hanly* v. *Kleindienst,* 471 F.2d 823, 830-831 (2nd Cir. 1972), *cert. denied,* 412 U.S. 908 (1973), and *First National Bank* v. *Richardson,* 484 F.2d 1369, 1373 (7th Cir. 1973), the agency must consider:

> "(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area."

It has been held that the requirement of consideration of environmental factors 'to the fullest extent possible' sets a high standard for agencies, a standard which must be rigorously enforced by reviewing courts" and that if the decision was reached procedurally without individualized consideration of environmental factors — conducted fully and in good faith — it is the responsibility of the courts to reverse. *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

In determining whether environmental consequences have been fully considered in the decision-making process, as mandated by the Act, the evidence reasonably available to the decision maker must be compared with the evidence actually considered and balanced in making the decision. Only through such a comparative process can the court reach a conclusion as to the basis of the agency's decision. As the Eighth Circuit has stated, "the review is a limited one for the purpose of determining whether the agency reached its decision after a full, good-faith consideration of environmental factors made under standards set forth in NEPA § 102 and whether the actual balance of costs and benefits struck by the agency according to these standards gave insufficient weight to environmental factors." *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F.2d 346 (8th Cir. 1972).

The foregoing authorities clearly support the conclusion that, when a major federal action is involved, an environmental assessment must be prepared in accordance with procedures required by NEPA in order to analyze the actual or potential affect of that action upon the quality of the human environment and that the assessment is subject to judicial review. A conflict has arisen among the circuits, however, as to the proper standard of judicial review to be applied, and it would be appropriate in the present case for this Court to resolve that conflict.

In reviewing an agency's threshold determination, the Second, Fourth, and Seventh Circuit Courts of Appeals adhere to the "arbitrary and capricious" standard. *Hanly* v. *Kleindienst*, 471 F.2d 823, 828-29 (2nd Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Rucker* v. *Willis*, 484 F.2d 158, 162 (4th Cir. 1973); *Nucleus of Chicago Homeowners Ass'n* v. *Lynn*, 524 F.2d 225, 229 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3531, _____ U.S. _____ (1976). The Fifth, Eighth, Ninth and Tenth Circuit Courts of Appeals adhere to the broader standard of "reasonableness." *Save Our Ten Acres* v. *Kreger*, 472 F.2d 463, 465-66 (5th Cir. 1973); *Minnesota Public Interest Research Group* v. *Butz*, 498 F.2d 1314, 1319-20 (8th Cir. 1974) (en banc); *City of Davis* v. *Coleman*, 521 F.2d 661, 673-74, and n. 16 (9th Cir. 1975); *Wyoming Outdoor Coordinating*

Council v. *Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973).

In the present case, the district court concluded that, under either the arbitrary and capricious standard or a standard of reasonableness, the assessment performed by Respondents as to the impact of the LBAD realignment on the quality of the human environment did not comply with NEPA. On appeal, the Court of Appeals did not apply either test but decided simply that this case did not fall within the purview of NEPA.

With respect to review of mixed questions of law and fact, this Court has laid down the "rational basis" test whereby an agency's decision must be reversed unless it has "warrant in the record" and a "reasonable basis in law." *NLRB* v. *Hearst Publications*, 332 U.S. 111, 131 (1944); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939). Accordingly, in reviewing the Army's threshold determination here, the appropriate standard of review should be the "rational basis" or "reasonableness" test as applied in the light of all information reasonably available at the time of the threshold determination. This standard of review is succinctly set forth in *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973):

> "Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good-faith consideration and balancing of environmental factors."

Accord, *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F.2d 346 (8th Cir. 1972); *Schicht* v. *Romney*, 372 F. Supp. 1270 (E.D. Mo. 1974).

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT CONCLUSIVELY DEPRIVED PETITIONERS OF ANY OPPORTUNITY TO PRESENT EVIDENCE ON THEIR BEHALF EXCEPT UPON A MOTION FOR A PRELIMINARY INJUNCTION.

We believe that the Sixth Circuit Court of Appeals erroneously considered the Army's appeal from the order granting a preliminary injunction as an appeal on the merits of the case. We believe that NEPA undoubtedly would apply to the closing of some military bases, especially where there is resulting change of land use, even if socio-economic effects alone are not within the purview of NEPA. Conceivably, the closing or cutting back of some military bases might not require full compliance with the provisions of NEPA. However, the effect upon the environment of a proposal to close or cut back, in such manner as to constitute a major federal action, is a question of fact. That is true regardless of whether socio-economic factors are to be considered within NEPA's purview.

A factual issue was presented to the district court. It was alleged in the complaint that neither an environmental impact assessment nor an environmental impact statement was filed in accordance with the requirements of NEPA. The record demonstrates that Respondents did not make a good faith effort to prepare an environmental impact assessment. The district judge's findings of secrecy and subterfuge with regard to the environmental assessment are fully supported by the record and were not even considered in the opinion of the Sixth Circuit Court of Appeals. After the hearing on Petitioners' motion for a preliminary injunction, Petitioners received reliable information, supported by documentary evidence, that the Army had plans to turn over part of the 15,000 acre tract on which LBAD is located to a local airport board for construction of a civilian airfield. This was brought to the trial court's attention by amended complaint. The trial court thus has before it allegations that not only will the depot be effectively dismantled but that the land use will be changed to accommodate the needs of a commercial airport.

The district judge was of the opinion, and we believe properly so, that these issues needed to be developed and he granted a preliminary injunction pending a formal hearing. The Army filed a notice of appeal from "the Order and Preliminary Injunction entered in this action on October 31, 1975." The

only question actually before the Sixth Circuit Court of Appeals was whether the preliminary injunction should remain in force pending development of the case. We believe the Circuit Court should have permitted the preliminary injunction to remain in effect until the factual issues were fully developed in the trial court. However, assuming that the evidence before the Court of Appeals did not justify issuance of a preliminary injunction, that evidence was presented for purposes of the motion for a preliminary injunction. The Court of Appeals should not have denied Petitioners the opportunity to establish, at a trial on the merits, a primary impact on the physical environment which would render NEPA applicable under the view of that Act adopted by the Court of Appeals. Certainly, there is a factual issue at least as to whether the Army filed a good faith environmental impact assessment and whether the Army plans to change the land use to commercial-airport. We urge this Court to allow these issues to be developed.

CONCLUSION

The Preliminary Injunction should have remained in force under any view of the case. If NEPA applies to people as well as to ecology, then there can be no doubt that Defendants must file an Environmental Impact Statement; if NEPA applies only to ecology, as distinguished from people and their housing and employment problems, then the Army is required to file an Environmental Assessment from which it can be determined whether an EIS should be filed. Moreover, this case has not been fully developed. The proceedings in the District Court took place before Defendants had even filed an Answer. Plaintiffs therefore were not apprised of how much of the Complaint Defendants were denying. Sufficient proof to justify a Preliminary Injunction was introduced, but not any more than that. A hearing on a motion for a preliminary injunction does not, of course, contemplate the full hearing on the merits to which Plaintiffs are entitled before this cause is finally decided.

It is very clear from this record that Defendants have made no good faith effort even to prepare an EIA. They not only failed to comply with the provisions of NEPA, but compounded this failure by being less than candid with those officials and civic leaders who were entitled to be informed. The

District Judge's findings of secrecy and subterfuge on the part of some of the Defendants is fully supported by the record.

The argument that there is something unique about this factual situation which takes it out of the ambit of NEPA won't hold water. Defendants were not dealing with another Manhattan project or a deployment of troops against a potential enemy. The people of the Lexington area pose no threat to the security of our country. They are for the most part peace loving citizens entitled to equal protection of the laws, including the safeguards of the Congressional Act now called NEPA.

Defendants make the very salient point the Plaintiffs are not permitted to question the wisdom of the Army's decision. That's very true and by the same reasoning, Defendants may not question the wisdom of the Congressional Act here in issue. Defendants must comply with the Congressional mandate like everybody else.

A decision by this Court as to the proper standard of review would be helpful to these litigants here and elsewhere. Too many cases are being disposed of on motions for temporary injunctions by application of standards more restrictive than Congress desired.

This court is urged to grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

No. 75-2505

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

John B. Breckinridge, Et al., *Appellees,* v. Donald H. Rumsfeld, Et Al., *Appellants.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed July 9, 1976.

Before PHILLIPS, Chief Judge, and CELEBREZZE and MILLER,* Circuit Judges.

PHILLIPS, Chief Judge. The question presented on this appeal involves the breadth to be given to the term "human environment" as used in the National Environmental Policy Act (NEPA). 42 U.S.C. § 4321, *et seq.* Specifically, does action by the United Stated Army which reduces jobs and transfers personnel from the Lexington-Bluegrass Army Depot (LBAD) to depots in California and

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*Judge William E. Miller died April 12, 1976, and did not participate in the decision in this case.

Pennsylvania constitute "a major Federal action significantly affecting the quality of the human environment," within the meaning of 42 U.S.C. § 4332 (C)?

The District Court enjoined the Army from proceeding with the proposed transfer until a formal environmental impact statement has been prepared and circulated. We hold that the District Court was in error in undertaking to transform NEPA from a law designed to protect and enhance the natural resources of the nation into a statute prohibiting the discharge and transfer of personnel at an army installation, and that it was not the intention of Congress for NEPA to be used for purposes of promoting full employment or to prevent the discharge or transfer of federal personnel. We conclude that the injunction must be dissolved and the decision of the District Court requiring an environmental impact statement must be reversed with directions to the District Court to dismiss the suit.

On November 22, 1974, the Secretary of Defense announced 111 actions involving realignment of units and closures of particular bases. One of the actions affected LBAD to the extent that 18 military and 2,630 civilian jobs would be eliminated in the Lexington area. The Army prepared an environmental assessment which concluded that because there was

to be no significant effect on the human environment, a formal environmental impact statement was not required. Additionally, a non-governmental research institution, Battelle Columbus Laboratories, studied the possible socio-economic impact of the action and concluded that the Lexington area would suffer only minimal short term unemployment as a result of the partial closure.

An August 22, 1975, a complaint was filed in the United States District Court seeking an injunction to block the proposed action. The plaintiffs included four Kentucky Congressmen, two United States Senators, two county judges, the City of Richmond, Kentucky, the Lexington-Fayette Urban County Government, the Greater Lexington Chamber of Commerce, three property and business owners in the vicinity of LBAD and four civilian employees at LBAD. The defendants were the United States Army, the Secretary of Defense, the Secretary of the Army, the Army Chief of Staff, and the Department of Defense. The District Court granted the plaintiffs a preliminary injunction on October 31, 1975, but did not rule upon the question which this court concludes to be dispositive as to the litigation: Does the scope of the term "human environment" extend to the closing of a military base and transfer of personnel and functions by the United States Army?

Appellants' assert that this is not an environmental lawsuit. They argue that Congress did not intend that NEPA be a statutory cure-all for the temporary economic ills of Lexington, Kentucky. The appellees counter by stating that socio-economic impacts fall within the scope of NEPA and contend that the term "human environment" means environment which directly affects human beings, including unemployment and loss of revenue. The appellants argue that NEPA is directed only to the preservation of those resources needed to sustain present and future generations and that personal and economic interests are not in and of themselves sufficient to bring the statute into play. In the present case there is no long term impact, no permanent commitment of a national resource and no degradation of a traditional environmental asset, but rather short term personal inconveniences and short term economic disruptions. We conclude that such a situation does not fall within the purview of the Act.

The contention that NEPA goes beyond what might be stated to be the "physical environment" is not in dispute. Environmental impact statements have been mandated in such diverse instances as construction of a federal jail in the back of the United States Court House in Manhattan. *Hanly* v. *Kleindienst*, 484 F.2d 448 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *Hanly* v. *Kleindienst*,

471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S 908 (1973); *Hanly* v. *Mitchell*, 460 F.2d 640 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972); and railroad abandonment proceedings. *Harlem Valley Transportation Ass'n* v. *Stafford*, 500 F.2d 328 (2d Cir. 1974); *City of New York* v. *United States*, 337 F.Supp. 150 (E.D. N.Y. 1972).

Although factors other than the physical environment have been considered, this has been done only when there existed a primary impact on the physical environment. *See Chelsen Neighborh'd Ass'ns* v. *U.S. Postal Service*, 516 F.2d 378, 388 (2d Cir. 1975); *Minnesota Public Interest Research Group* v. *Butz*, 498 F.2d 1314, 1322 (8th Cir. 1974); *Maryland-National Capital Park* v. *United States Postal Services*, 487 F.2d 1029, 1037-38 (D.C. Cir. 1973); *Hanly* v. *Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972).

In discussing the breadth of NEPA, the District of Columbia Circuit has stated:

> Not all deviations from local zoning will necessarily rise to the level of affecting the "quality of human environment" within the fair meaning of that term. The "overriding" issue underlying MNCPC's recommended rejection of this project was "social and economic" and as we observed, rooted in the prospective loss of real and personal property taxation. A secondary, and related factor, was the prospect

> of an influx of low-income workers into the County. Concerned persons might fashion a claim, supported by linguistics and etymology, that there is an impact from people polution on "environment," if the term be stretched to its maximum. We think this type of effect cannot fairly be projected as having been within the contemplation of Congress. Maryland-National Cap. Pk. & Pl. Com'n. v. U.S. Postal Serv., 487 F.2d 1029, 1037 (D.C. Cir. 1973)

See also, National Association of Government Employees et al. v. *Rumsfeld,* _____ F.Supp ____ (D. D.C. No. 75-1670, May 14, 1976); and *American Association of Government Employees et al.* v. *Rumsfeld,* _____ F.Supp. _____ (W.D. Texas, Nos. SA-76-CA-116, SA-76, CA 116, May 13, 1976).

We conclude that the facts of the present case likewise do not come "within the contemplation of Congress."

In discussion of NEPA on the floor of the Senate, Senator Jackson provided insight into the breadth of the statute:

> What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which will do irreparable

> damage to the air, land, and water which support life on earth.
>
> * * *
>
> An environmental policy is a policy for people. Its primary concern is with man and his future. The basic principle of the policy is that we must strive in all that we do, to achieve a standard of excellence in man's relationships to his physical surroundings.
>
> * * *
>
> Taken together, the provisions of section 102 directs any Federal agency which takes action that it must take into account environmental management and environmental quality considerations. 115 Cong. Rec. 40416 (1969).

In seeking to define the crucial term "the human environment," Senator Jackson stated:

> Mr. President, there is a new kind of revolutionary movement underway in this country. This movement is concerned with the integrity of man's life support system — the human environment, 115 Cong. Rec. 40417 (1969).

To extend the meaning of "the integrity of man's life support system" to apply to the factual situation involved in this case would distort the congressional intent. Since the case before us is primarily concerned with the effects of unemploy-

ment, an analogy drawn by Senator Jackson is of significance:

> In many respects, the only precedent and parallel to what is proposed in S. 1075 is in the Full Employment Act of 1946, which declared an historic national policy on management of the economy and established the Council of Economic Advisers. It is my view that S. 1075 will provide an equally important national policy for the management of America's future environment. 115 Cong. Rec. 40416 (1969)

NEPA is not a national employment act. Environmental goals and policies were never intended to reach social problems such as those presented here.[1] We, therefore, dissolve the injunction and reverse the judgment, remanding the case to the District Court for dismissal.

No costs are taxed. Each party will bear his own cost on this appeal.

* * * * * * *

1. The United States District Court for the Western District of Missouri has adopted a view contrary to ours in a case involving a similar factual situation. *McDowell* v. *Schlesinger*, 404 F.Supp. 221 (W.D. Mo. 1975). We respectfully decline to follow the reasoning of that opinion.

Filed Oct 31 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

JOHN B. BRECKINRIDGE, Member of Congress, Et Al — PLAINTIFFS

VS — CIVIL NO. 75-100

MEMORANDUM OPINION

JAMES R. SCHLESINGER, Secretary of Defense, Et Al — DEFENDANTS

* * * * *

Plaintiffs seek injunctive relief to restrain defendants from closing down the Lexington-Bluegrass Army Depot and transferring its functions to similar installations in California and Pennsylvania. It is alleged that such action on the part of the defendants will directly cause the unemployment of approximately 2,600 civilian employees in addition to the impact the dismantling will have upon those not employed by the federal government but whose livelihood depends on the existence of the depot. This action arises under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et. seq.*, hereinafter referred to as NEPA, and the Environmental Quality Improvement Act of 1970, 42 U.S.C. 4371 *et. seq.* Jurisdiction is predicated on 28 U.S.C. 1331 and 5 U.S.C. 702; and the Court is said to have jurisdiction to grant declaratory relief pursuant to 28 U.S.C. 2201 and 2202.

The gist of the complaint appears to be that the Secretary of Defense, and the other defendants in arriving at their policy decision to terminate the operation of the depot failed to properly assess the physical and sociological impact the proposed action would have upon the greater Lexington area and the areas surrounding the depots in California and Pennsyvania that would assume the functions of the Lexington operation.

More particularly, plaintiffs aver that defendants failed to comply with their own regulations and directives in that:

> (a) the environmental assessment is inadequate as it does not contain all the information required by the regulations; does not relate to the decision actually made by defendants; and does not fully and adequately discuss alternatives to the proposed action;
>
> (b) defendants failed to prepare a final environmental statement for the proposed action;
>
> (c) no public hearings were held, nor were the views of the public and special interest groups solicited.

The plaintiffs further state that a violation of section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332 has occurred from the defendants' failure to prepare the detailed impact statement required therein.

The plaintiffs further conclude that any decision on the part of the defendants that the aforesaid environmental effects would be minimal and that an environmental impact statement as envisioned by section 102(2)(C) was not required, was inadequately supported, was arbitrary and capricious, and thus an abuse of discretion. Mention is also made of Defense Directive 6050.1 and 32 C.F.R. 214.7(e) requiring defendants to prepare an environmental impact statement on proposals which are highly controversial because of environmental aspects, even if it were determined by defendants that the proposed action would not significantly affect the environment. The plaintiffs, seeing the environmental aspects as being highly controversial, assign as error defendants' failure to follow their own directives and regulations.

For these reasons, the plaintiffs pray that a preliminary injunction issue to restrain defendants from implementing their proposed plan to dismantle the Lexington-Bluegrass Army Depot and that, after an evidentiary hearing before the Court, a permanent injunction issue against the implementation of project CONCISE, as the proposed plan is known.

Procedurally, the case is now before the Court upon the plaintiffs' motion for a preliminary injunction and the defendants' motion for summary judgment. In recognition of the fact that the latter

motion, if successful, would be dispositive of the controversy, the Court shall give it first attention.

The main thrust of the plaintiffs' case appears to center on the argument that the defendants have failed to comply with section 102(2)(C) of the Act, 42 U.S.C. 4332(2)(C), which provides, *inter alia,* that the subject agency publish a detailed Environmental Impact Statement (EIS) is the action contemplated is a major federal action that would significantly affect the quality of the human environment.

The defendants contend that with the cessation of hostilities in Vietnam and the concomitant reduction in the size of the Army, the capacity of three associated depots far exceed current and planned communications electronics maintenance requirements and that a curtailment in operations was necessary. They further contend that because of more modern facilities at the Pennsylvania depot and the location and other major missions assigned to the Sacramento Army Depot, it was deemed most expedient to phase down the Lexington-Bluegrass installation.

After the proposed realignment is completed, the Lexington-Bluegrass facility would continue to be an active installation of some 1594 employees.[1]

1. Defendants' brief in support of their motion for summary judgment, page 2.

The cost reduction attributable to the proposed action is thought to be approximately Thirty Seven Million Dollars, with the funds being reallocated from the maintenance function to the support of an increased Army combat structure.[2]

It is asserted by the defendants that the so-called "realignment" of the Lexington-Bluegrass Army Depot does not involve any long-term impacts, any permanent commitment of natural resources, or any degradation of traditional environmental assets. Defendants further allege that the impact of the realignment is limited to short term personal inconveniences and short term economic disruptions.

Thus, the defendants have taken the stance that although the proposed action is a major federal action, its implementation would not significantly affect the quality of the human environment, therefore obviating the need for the publication of an Environmental Impact Statement.

With the issue thus framed, the Court must focus its attention on the threshold determination made by the Department of Defense and the Army that the proposed action would not significantly affect the quality of the human environment within the meaning of the Act.

2. id.

NEPA is a procedural act requiring all federal agencies to consider values of environmental preservation in their spheres of activity, and it mandates that certain procedural steps be taken to ensure that those values are duly considered in the agency decision-making process. *Calvert Cliffs' Coord. Com.* v. *U.S.A.E.C.*, 449 F.2d 1109 (D.C. Cir. 1971).

In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental *costs*; and alternatives must be considered which would affect the balance of values. *Calvert Cliffs' Coord. Com., supra.*

While the particular federal agency involved has the authority to make its own threshold determination as to whether NEPA requires an impact statement in connection with a project, the agency also has the duty of making clear its threshold decision, the rationale behind it, and the means of arriving at that determination. Perfunctory and conclusory language will not suffice, as the Act requires federal agencies to affirmatively develop a reviewable environmental record. *Citizens for Clean Air, Inc.* v. *Corps of Engineers, U.S. Army*, 349 F.Supp. 696 (D.C.N.Y. 1972); *Hanley* v. *Kleindienst*, 471 F.2d 823 (2nd Cir. 1972) Cert. denied 412 U.S. 908; (*Hanley* II), for earlier history

see *Hanley* v. *Mitchell*, 460 F.2d 640 (2nd Cir. 1972) cert. denied 409 U.S. 990, (*Hanley I*).

Without such a record, it is impossible for a district court to determine whether or not the agency has complied with sections 102(2)(A), (B), and (D) of NEPA, 42 U.S.C. 4332(2)(A), (B), and (D). *Hanley II, supra*, 471 F.2d at 834.

Section 102(2)(B) of the Act is particularly germane to this discussion, as it requires the responsible agencies to identify and develop methods and procedures of review which will give appropriate consideration to presently unquantified environmental amenities. Such procedures should encompass the sending of some form of notice and communication with the affected public regarding the proposed action, as consideration of relevant facts and comments offered by the public is not only proper but necessary. *Simmans* v. *Grant*, 370 F.Supp. 5 (S.D.Tex. 1974); See *Hanley II, supra*, 471 F.2d at 835.[3]

3. The Second Circuit reasoned that since an agency in making a threshold determination as to the "significance" of an action, is called upon to review in a general fashion the same factors that would be studies in depth for preparation of a detailed environmental impact statement; section 102(2)(B) requires that some rudimentary procedures be designed to assure a fair and informed preliminary decision. The Court held that those procedures involved in reaching the threshold determination of significance must include the giving of notice to the public of the proposed major federal action and affording an opportunity to submit relevant facts which might bear upon the agency's threshold decision. 471 F.2d at 836.

The initial study performed is designated as "*the case study and justification folder*" and *followed* the decision-making process.[4] The analysis considers, inter alia, adequacy of housing facilities; availability of utilities and energy sources; the geography from the standpoint of physical location, weather, and terrain, the environmental impact of the realignment at the Lexington Depot on the surrounding area.[5]

The environmental assessment is incorporated into this document and appears to do no more than state such bald conclusions as:

> "(5) Because of the appreciable decline in the maintenance mission, the potential of that operation to adversely affect the environment is significantly reduced.
>
> . . . . .
>
> (7) It might be anticipated that the action would improve the quality of the human environment."

The so-called "assessment" finally concludes:

> "The proposed action is considered to be a major action. A significant environmental impact will not result from the action.

4. Defendants' brief in support of their motion for summary judgment, page 6.

5. id. page 6.

> Implementation of the plan of action will not be environmentally controversial."

Also included in the Case Study and Justification Folder were sections dealing with the socio-economic impact upon the losing community and an analysis of the alternatives to the proposed action.

Concurrently, the Assistant Secretary of Defense and the office of the Chief of Staff of the Army contracted with Battelle-Columbus Laboratories to conduct a study on the socio-economic impact of a reduction in force in the Lexington-Bluegrass area.[6] The result of that liason was the so-called Battelle Report which became the source of considerable interest at the hearings of September 26-27, 1975.

The Battelle Report addressed, *inter alia*, the following subjects: socio-economic environment, including population characteristics, labor force and employment characteristics; local industries; tourism; recreational, cultural, and historical resources; human resources programs; long-term economic growth outlook; the impact of the proposed realignment and other economic impacts upon the Lexington-Bluegrass area; an evaluation of recent

6. Defendants' brief in support of motion for summary judgment, page 10; Defendants' Exhibit 4, affidavit of Berry Cantor, page 2.

area development efforts; and a preliminary strategy for the development of the Lexington-Bluegrass area after realignment. The report concluded that the greater Lexington area enjoyed great economic vitality and would therefore be able to absorb the economic impact of the reduction in unemployment and maintain a favorable long-term economic outlook.

Department of Defense directive 6050.1, 32 C.F.R. 214.7(a) provides in part:

> "(a) It is impossible to list categorically all DoD projects or activities that are 'major Federal actions significantly affecting the quality of the human environment'. In making a judgment in a particular case, it will be necessary for the proponent of this action to assess the expected environmental effects the action *in conjunction with the intent of the National Environmental Policy Act* (NEPA) as implemented by the Council on Environmental Quality (CEQ) . . . (Emphasis supplied)

Section 101(a) of the NEPA, 42 U.S.C. 4331(a) reads as follows:

> "Congressional declaration of national environmental policy

> '(a) The Congress . . . declares that it is the continuing policy of the Federal Government, *in cooperation with state and local governments*, and other concerned public and private organizations, to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.' (Emphasis supplied)."

This spirit of openness and cooperation with state and local governments is reflected in a subsequent paragraph of the defendants' own directive, DoD 6050.1, 32 C.F.R. 214.7, 214.7(d)(21):

> "(d) certain types of actions require close environmental scrutiny because of the possibility that they may either affect the quality of the environment or create environmental controversy. *It may be desirable in such cases to have a complete presentation of the environmental aspects of the proposed action available for any interested party.* For these reasons, consideration shall be given to documenting the environmental effect of the following types of actions in writing:
>
> . . . . .
>
> (d)(21) any action which, because of real, potential or *purported* adverse environmental consequences, *is a subject of controversy*

> *among people who will be affected by the action, or which, although not the subject of controversy, is likely to create controversy when the proposed action becomes known by the public.*" (emphasis supplied)

In contravention of this language, the defendants maintained what they termed a "close-hold tab" on the proposed action during the course of their decision-making process and subsequent review. This clandestine procedure is apparently a designation by the Army of non-classified material that is nonetheless kept from public view. It was stated by counsel for the defendant agencies at the hearings of September 26, 27, 1975, that on the basis of the conclusion reached in the Battelle Report,[7] no public hearings were held as they did not wish to alert the affected public to the proposed action.

However valid that justification may be, it cannot be controverted that secrecy in the agency decision-making process runs counter to the clear thrust of NEPA, *McDowell* v. *Schlesinger*, _____ F.Supp. _____, (W. D. Mo., Civil No.

7. The Report concluded that the economic vitality of the area precluded a finding that the proposed action would significantly affect the human environment. This assessment of the Report was also announced by defense counsel at the aforesaid hearing. Encl. B. to Defendants' Exhibit 1, Battelle Report, page 2-23.

75-CV-234-W-4). NEPA, above all, is an environmental full disclosure law, *M.P.I.R.G.* v. *Butz*, 498 F.2d 1314 (8th Cir., *En Banc*, 1974). The "close-hold procedure", as the *McDowell* court noted:

> " . . . limits drastically the available sources of information to which an agency might turn in making the threshold decision as to the applicability of section 102(2)(C), and comments and input from individuals and groups who may well be in the best position to assess the effects of the proposed action."
>
> . . . . .
>
> *McDowell* v. *Schlesinger*, supra, slip op. at 61, n. 1.

In the face of an apparent violation of both the spirit of the Act and their own regulation, the defendants contend that their study of Lexington-Bluegrass was interdisciplinary in nature and comprehensive; was conducted by numerous individuals; was processed through the Army staff in such a manner that insured thorough review; and was continually updated and reassessed.[8]

While a review of the administrative record in its entirety may reveal that environmental factors were considered by the defendants, the record also reflects that the studies encompassing environmental

8. Defendants' brief in support of motion for summary judgment, page 31.

aspects of the proposed action were only initiated after the initial decision was made.

It is significant to note that the initial draft of the Battelle Report was available to the Army staff and that a meeting was held in Columbus, Ohio, on September 9, 1974, between representatives of the Department of Army, Department of Defense, and staff members of Battelle to discuss the results of the study.[9] From the testimony adduced at the hearing, changes in the report were made by Battelle at the behest of the Department of Defense and Department of Army. Specifically, suggestions were made to *"strengthen"* portions of the report dealing with ways to alleviate the economic impact. The final report was transmitted on October 9, 1974.

The fact that officials from the Department of Army and Department of Defense reviewed the initial draft and made suggestions to *"strengthen"* a portion of the Report, when combined with the admission of defendants' brief that the case study and justification folder followed the decision-making process, raises grave questions as to the objectivity of the amassed data. It would appear that the initial decision was made prior to the collection of information concerning the impact of the proposed action and that the reports submitted were not objective studies, as purported, but were made with

9. page 9, Defendants' summary judgment brief

an eye towards the justification of the initial decision.

The Court has a great deal of difficulty in accepting the manner in which defendants gathered their information. While fully aware that it is not the function of the Court to 'direct the exercise of judgment or discretion in a particular way', *Schatten* v. *U.S.*, 419 F.2d 187, 192 (6th Cir. 1969), quoting from *Wilbur* v. *U.S. ex. rel. Kadrie*, 281 U.S. 206, 218 (1930); the dangers of making a decision of such magnitude, albeit a threshold determination, without accurate unbiased information cannot be over-emphasized. This would hold true where, as here, it might superficially appear that the environmental effects on the losing installation may be negligible.[10]

This concern was recognized by Congress in the passage of NEPA which, as noted earlier, is a procedural act implemented to insure that appropriate safeguards are taken at all stages of the

10. This case presents, according to the exhibits filed by plaintiffs, secondary effects on the losing community of a much lesser degree than was witnessed in the *McDowell* case. See affidavit of Edward E. Sturgeon, Jr. Moreover, the impact on the local school systems affected by the realignment will be greatly reduced by federal assistance available to "impacted" school districts under the provisions of 20 U.S.C. 236 *et. seq.*, as amended, under subsection (e) of said statute (as amended August 21, 1974, by Section 305(a)(1), P.L. 93-380, 88 Stat. 523) 20 U.S.C. 238(e), the local schools will have four years within which to absorb whatever loss in student population is caused by the implementation of the proposed realignment.

agency decision-making process. *Environmental Defense Fund* v. *Tennessee Valley Authority,* 468 F.2d 1164 (6th Cir. 1972); *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe,* 487 F.2d 849 (8th Cir. 1973). Compliance with section 102 of the Act requires at the minimum a good faith effort on the part of the responsible federal agency to objectively weigh the real or potential environmental ramifications of a proposed action, as opposed to a subjective impartiality. *Life of the Land* v. *Brinegar,* 485 F.2d 460 (9th Cir. 1973) cert. denied 416 U.S. 961); *E.D.F.* v. *Corps of Engineers,* 470 F.2d 289, 296 (8th Cir. 1972) cert. denied 412 U.S. 931.

This objectivity in evaluating environmental impact is required at all levels of the decision-making process, to include: selection of consultants; undertaking environmental studies; reliance upon such studies; creation of environmental assessments; and coordination with reviewing agencies. *Sierra Club* v. *Froehlke,* 359 F.Supp. 1289, 1342 (S.D. Tex. 1973).

To say that these *ex post facto* efforts of the defendants, shrouded in secrecy, comply with the strict procedural requirements of NEPA would be to blithely ignore the mandate of the Act, which requires consideration of environmental matters to be more than a mere pro forma ritual conducted after the initial decision has been made. *Life of the*

Land v. *Brinegar, supra,* at 466 n. 7; *Maryland-National Cap. Pk. & Pl. Com'n.* v. *U.S. Postal Service,* 487 F.2d 1029 (D.C. Cir. 1973) cert denied 416 U.S. 974, rehearing denied 419 U.S. 1041. The Act further requires full disclosure to insure that environmental factors are given substantial and consistent consideration in the agency decision-making process, even where it may conflict with other federal objectives. *Sierra Club* v. *Froehlke, supra.*

The question might be raised that despite the agency's haphazard approach, the ultimate result would not be altered as the environmental concerns over the realignment are largely unfounded. However the Court is not persuaded by such reasoning, as it is of the firm opinion that the provisions of NEPA must be vigilantly enforced to prevent administrative laxity and to ensure that the high Congressional purposes underlying NEPA become a reality. See *Hanley II, supra,* dissent, Friendly, J. at 840; *City of New York* v. *United States,* 337 F.Supp. 150 (E. D. N. Y. 1972); *Arizona P.S.C.* v. *F.P.C.,* 483 F.2d 1275, 1283 (D. C. Cir. 1973); *Arlington Coalition on Transportation* v. *Volpe,* 458 F.2d 1323, 1331 (4th Cir. 1972), cert. denied 409 U.S. 1000.

NEPA's requirements are specifically designated to counter the inevitable agency bias in favor of a proposal or project, *E.D.F.* v. *Corps of Engineers,*

supra, and to effectuate substantive changes in the agency decision making-process, *M.P.I.R.G.* v. *Butz, supra.* The negative threshold determination reached in the instant case appears to be little more than a bald conclusion reached by way of a perfunctory after the fact analysis of less than impartial data.

As the Court of Appeals for the District of Columbia stated in *Calvert Cliff's Coordinating Committee* v. *U.S.A.E.C.*, supra, at 1115:

> "We conclude then that section 102 of NEPA mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. *But if the decision was reached procedurally without individualized consideration and balancing of environmental factors — conducted fully and in good faith — it is the responsibility of the Courts to reverse.* As one District Court said of section 102 requirements: *'It is hard to imagine a clearer or stronger mandate to the Courts'.*" (Emphasis supplied)

Whether the Court adopts the test of reasonableness of agency action adhered to by the Eighth and Fifth Circuits, *M.P.I.R.G.* v. *Butz,*

supra at 1320; *Save Our Ten Acres* v. *Kreger,* 472 F.2d 463, 466 (5th Cir. 1973); or the arbitrary and capricious standard recognized in the Ninth, Second, and District of Columbia Circuits, *A & C Environmental Defense Fund* v. *Armstrong,* 487 F.2d 814, cert. denied 945 S.Ct. 2002 (1973); *Hanley II, supra; Arizona P.S.C.* v. *F.P.C., supra;* a violation of the Act is apparent under either test.

The defendants have, by their misfeasance, placed the case in such a posture that an Environmental Impact Study is required; as it is the only remedy available to plaintiffs that would act to alleviate the transgressions of the defendants, which include primary reliance on information acquired subsequent to the initial decision and in one instance, directing that certain changes be made in the final draft of a supposedly objective study; i.e. the Battelle Report. Such agency behavior cannot be tolerated as it violates both the letter and the spirit of NEPA.[11]

11. The credibility of the Battelle Report having been seriously impaired and the CONCISE report being in the nature of a subsequent justification for a decision previously made, it is impossible to now gauge the true effect of implementation of the proposed realignment.

Additionally, the Secretary of the Army, exhibiting what in retrospect appears to be an obvious lack of candor, assured Congressman Breckinridge, a party plaintiff to this action, as late as August 9, 1974, that the Kentucky Congressional delegation would be kept fully informed on future decisions that would have a significant effect on the Depot. (Plaintiffs' Exhibit 1 (d))

The plaintiffs advance the novel theory that the term "human environment", as embraced by the Act, encompasses such secondary socio-economic ramifications of major federal actions as unemployment and economic dislocation.

In as much as the defendants have utterly failed to make the proper Environmental Impact Study and must now belatedly make such study and file a Final Environmental Impact Statement, the Court is not required to decide at this time the issue raised by plaintiffs' contention as to the scope of the term "human environment", as used in the Act.

The defendants do not appear to seriously question the plaintiffs' standing to maintain this action. Moreover, the Court notes that Section 10 of the Administrative Procedure Act provides for judicial review should an individual suffer a legal wrong or be adversely affected or aggrieved by an agency action within the meaning of a relevant statute, 5 U.S.C. 702.

The satisfaction of a two-fold test is required to confer standing under the above section. First, plaintiffs must show that the challenged action has or will cause him injury in fact, and secondly, that the alleged injury is to an interest which is "arguably within the zone of interests to be protected or regulated by the statutes" that plaintiff claims the agency has violated. *United States* v.

S.C.R.A.P., 412 U.S. 669 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

The Court in *Coalition For the Environment* v. *Volpe*, 504 F.2d 156 (8th Cir. 1974) said of standing, at page 168, that it was a threshold inquiry where the Court must consider not the weight or significance of the alleged injury, but only whether it exists.

The record now before the Court reveals that some environmental impacts may occur from the proposed action. The true significance of the environmental impact is not ascertainable from the data compiled due to the taint placed upon it by the defendants' surreptitious behavior in accumulating same. However, this is of no moment where the existence of an injury to an interest, "arguably within the zone of interests" protected by NEPA, has been shown. That interest being the statutory right of the public to have environmental aspects of a proposed major federal action fully considered by an agency at each and every stage of the decision-making process. To satisfy that interest, the procedural requirements of NEPA must be strictly complied with. There was no such compliance herein.

An appropriate order will this date be entered directing the defendants to comply fully with the requirements of section 102(2)(C) of NEPA, including the preparation of an Environmental

Impact Statement with its procedural requirements for public input *prior to* and as an integral part of any reconsideration by the defendants relating to implementation of the proposed plan to phase down said Lexington-Bluegrass Army Depot Facility.

The District Court has the power to enjoin implementation of the proposed action pending the filing of an Environmental Impact Statement, *M.P.I.R.C.* v. *Butz, supra* at 1323, and the Court is of the opinion that injunctive relief should be granted in view of the paramount public interest in seeing that the provisions of NEPA are fully carried out; the possibility that irreparable harm might occur to plaintiffs should an injunction not issue pending the completion of an Environmental Impact Study; and the favorable balance struck by the threat of harm to plaintiffs over the harm which may inure to the defendant agencies by the granting of an injunction.

For the foregoing reasons, the defendants' Motion for Summary Judgment should be overruled. The defendants will be directed to comply fully with Section 102(2)(C) of the Act, with the appropriate injunctive relief to issue as specified herein.

This the 31st day of October, 1975.

Bernard T. Moynahan, Jr., Judge

* * * * * * *

Filed Oct 31 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

JOHN B. BRECKINRIDGE, PLAINTIFFS
Member of Congress, Et Al

VS CIVIL NO. 75-100

PRELIMINARY INJUNCTION

JAMES R. SCHLESINGER,
Secretary of Defense, Et Al DEFENDANTS

* * * * * * *

In conformity with the Memorandum Opinion this date filed herein;

IT IS NOW THEREFORE ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) The plaintiffs' Motion for a Preliminary Injunction is sustained.

(2) The defendants are hereby directed to comply fully with the requirements of Section 102(2)(C) of the National Environmental Policy Act of 1969, including the preparation of an Environmental Impact Statement with due regard to the procedural requirements of said Act for public input prior to and as an integral part of any

reconsideration by the defendants relating to implementation of the proposed plan to phase down the Lexington-Bluegrass Army Depot facility.

(3) The defendants, JAMES R. SCHLESINGER, Secretary of Defense, MARTIN R. HOFFMAN, Secretary of Army, GENERAL FRED C. WEYLAND, Chief of Staff of the United States Army, THE DEPARTMENT OF DEFENSE, and THE UNITED STATES ARMY, and each of them, their officers, agents, servants and employees. and all other persons acting in concert with them, or under their direction or control, (are hereby enjoined and restrained from carrying out any phase of the proposed realignment of duties and functions of the Lexington-Bluegrass Army Depot, pending the further orders of the Court herein.) This paragraph of this order shall be subject to review by the Court upon appropriate motion after the defendants have filed the required Final Environmental Impact Statement; and nothing herein contained shall be construed as preventing the placement of current Depot employees in new positions elsewhere, should they voluntarily seek such placement.

(4) This Preliminary Injunction is issued upon the basis of the entire record herein and the evidence adduced herein showing that the defendants have not complied with the requirements of Section 102(2)(C) of the National Environmental Policy Act of 1969; and that the plaintiffs will suffer great,

immediate and irreparable loss, injury and damage if injunctive relief is not granted herein.

(5) This Preliminary Injunction is issued to preserve the Court's jurisdiction over the subject matter involved herein, is issued to protect and enforce its lawful orders; and due to the public nature of the issue involved and in the exercise of its discretion, the Court directs that this Preliminary Injunction issue without the giving of security therefor.

This the 31st day of October, 1975, at 2:33 o'clock P.M., E.S.T.

/s/ Bernard T. Moynahan, Jr.

Bernard T. Moynahan, Jr., Judge

* * * * * * * *

Filed Jul 9, 1976
Filed Sep 9, 1976

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2505

JOHN B. BRECKINRIDGE, ET AL., Appellees,

v.

DONALD H. RUMSFELD, ET AL., Appellants.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and MILLER, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed, the injunction dissolved and the cause remanded for dismissal.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

Issued as Mandate: September 7, 1976

COSTS: None

Filing fee ..... $_____
Printing ..... $_____
Total ..... $_____

A True Copy
Attest:

/s/ Gary Cohen

Deputy Clerk

* * * * * * *

Filed Sept. 10, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

JOHN B. BRECKINRIDGE,
ET AL PLAINTIFFS

VS CIVIL NO. 75-100

JUDGMENT ON MANDATE

DONALD H. RUMSFELD,
ET AL DEFENDANTS

* * * * * * * *

The United States Court of Appeals for the Sixth Circuit having issued a Judgment herein on July 9, 1976, and its Mandate thereon on September 7, 1976, which is in words and figures as follows, to wit:

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2505

JOHN B. BRECKINRIDGE, ET AL., Appellees,

v.

DONALD H. RUMSFELD, ET AL., Appellants.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and MILLER, Circuit Judges.

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THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed, the injunction dissolved and the cause remanded for dismissal.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Issued as Mandate: September 7, 1976

COSTS: None

Filing fee ..... $____

Printing ..... $____

Total ..... $____

And a copy of said Mandate being appended hereto, marked "Exhibit A" for identity; and the Court having on September 9, 1976, received a copy of same and have considered same and being sufficiently advised;

IT IS NOW THEREFORE ORDERED AND ADJUDGED HEREIN, in conformity with said Mandate, as follows:

(1) That the preliminary injunction issued by this Court in the above-styled action on October 31, 1975, be and the same is hereby dissolved.

(2) That the above-styled action be and the same is hereby dismissed and stricken from the docket of this Court.

This the 10th day of September, 1976.

/s/ Bernard T. Moynahan, Jr.

Bernard T. Moynahan, Jr., Judge

Notice is hereby given of the entry of this Order or Judgment on September 10, 1976
Davis T. McGarvey, Clerk
By: Hilda F. Watkins DDCC

A True Copy Attest
Davis T. McGarvey, Clerk
U.S. District Court
By: Hilda F. Watkins D.C.

* * * * * * * *